STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF TEACHERS GUILD, CALIFORNIA FEDERATION OF TEACHERS, LOCAL 1931, Charging Party, v. SAN DIEGO COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-4207-E PERB Decision No. 1455 July 31, 2001

Appearances: Gattey, Cooney & Baranic by Michael P. Baranic, Attorney, for American Federation of Teachers Guild, California Federation of Teachers, Local 1931; Liebert, Cassidy & Whitmore by Bruce A. Barsook and Nathan J. Kowalski, Attorneys, for San Diego Community College District.

Before Amador, Baker and Whitehead, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the American Federation of Teachers Guild, California Federation of Teachers, Local 1931 (AFT) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the San Diego Community College District (District) violated the Educational Employment Relations Act (EERA) [1] by prohibiting the distribution of certain materials through its internal mail system. AFT alleged that this conduct constituted a violation of EERA section 3543.5.[2]

[1]EERA is codified at Government Code section 3540 et seq.

[2]Section 3543.5 states, in pertinent part:

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge and their attachments, the warning and dismissal letters, AFT's appeal and the District's opposition. The Board finds the Board agent's dismissal to be free from prejudicial error and adopts it as the decision of the Board itself, subject to the following discussion.

DISCUSSION

In support of its amended charge, AFT submitted two previously circulated AFT communications which were critical of District actions and which were delivered through the intrasite mail system. AFT maintained that, because of such prior postings, the District cannot now refuse to deliver such materials.

In addressing these two prior communications, the Board agent noted that an employer does not commit an unlawful unilateral change when its actions are consistent with a previously unenforced provision of the collective bargaining agreement (CBA), citing to Marysville Unified School District (1983) PERB Decision No. 314 (Marysville).

In Marysville the CBA provided that teachers were entitled to one duty free lunch period of no less than 30 minutes each day. The Board found the CBA was not superceded by

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> It shall be unlawful for a public school employer to do any of the following:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

a consistent practice of 55 minute lunch breaks, and that the District did not violate its duty to bargain in good faith by unilaterally reducing the lunch period to 30 minutes. In addressing this question, the Board held:

> The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so.

The Board finds that its decision in Marysville is inapposite to the facts of this case. In the instant proceeding, there was no showing that the District had not chosen to enforce its contractual rights in the past. In other words, there was no evidence that the District had at one time distributed defamatory materials through the intrasite mail system, but was now refusing to do so under the provisions of Article 3.2 of the Office-Technical Agreement (OTA).

The two communications submitted in support of the amended charge are dissimilar to the documents in question here, both in their nature and their tone. One is a sarcastic piece criticizing a 14.8 percent management wage increase, the second is a mock loan application pertaining to the District's overpayment error which was the subject of the AFT memo of May 26, 2000. Although these two documents criticize and lampoon the District for some of its decisions, they do not approach accusing District representatives of engaging in felonious conduct.[3]

Marysville does not apply here because there were no prior incidents from which AFT could claim a waiver of the unenforced right upon which a unilateral change would be based. There was no unilateral change. The District was instead enforcing the provisions of the OTA, albeit for the first time.

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[3]An argument could be made that the District's delivery of these other documents, which were insulting to the District but not defamatory, showed the reasonableness of the District's actions, and that the District was in fact acting pursuant to the provisions of the OTA.

ORDER

The unfair practice charge in Case No. LA-CE-4207-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Baker joined in this Decision.

Dismissal Letter

March 29, 2001

Michael Baranic
Gattey, Cooney & Baranic
2445 Fifth Avenue, Suite 350
San Diego, California 92101-1665

Re: American Federation of Teachers Guild, California Federation of Teachers, Local 1931 v. San Diego Community College District
Unfair Practice Charge No. LA-CE-4207-E
DISMISSAL LETTER

Dear Mr. Baranic:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 18, 2000. The American Federation Of Teachers Guild, California Federation Of Teachers, Local 1931 (Union) alleges that the San Diego Community College District (District) violated the Educational Employment Relations Act (EERA)[1] by prohibiting the use of its employee mail system and other equipment for the distribution of particular communications to bargaining unit members.

I indicated to you in my attached letter dated March 2, 2001, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to March 9, 2001, the charge would be dismissed. You requested and received an extension of time.

I received your amended charge on March 16, 2001. In your amended charge, you again contend that the District interfered with the statutory access rights of the Union when it prohibited the use of the internal mail system for certain letters. However, as discussed in my letter of March 2, the Board has determined that proposals which define or expand a union's right to access are negotiable. Jefferson School District (1980) PERB Decision No.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

133. The expired collective bargaining agreement in this case contains a provision regulating the use of intrasite mail. Accordingly, the appropriate test for determining whether a violation of EERA occurred is that of a unilateral change.

You contend that the District did commit a unilateral change by imposing its own remedy of refusal to deliver. According to the Union, the District should have delivered the letters and filed a grievance over their defamatory nature. You also contend that the District waived its right to prohibit delivery by not asking for a meeting with the Union to discuss the refused delivery.[2]

However, the issue here is not whether the District might have chosen other methods to resolve the matter. A determination must be made whether the Union has established a prima facie case of a unilateral change. As discussed in my letter of March 2nd, the collective bargaining agreement contained a provision prohibited the use of the intrasite mail service for defamatory materials. Article 3.2 states that neither party "shall use District intrasite mail service or bulletin boards to transmit notices or post materials that defame." The subject materials were defamatory; the Union was not permitted to use the intrasite mail service to transmit them. The Union has not demonstrated a unilateral change. Grant Joint Union High School District (1982) PERB Decision No. 196.

You have submitted two previously circulated Union communications which were critical of District actions. These materials were delivered through the intrasite mail system. You contend that the District cannot now refuse to deliver such materials. However, the Board has held that an employer does not commit a unlawful unilateral change when its actions are consistent with previously unenforced provision of the collective bargaining agreement. Marysville Unified School District (1983) PERB Decision No. 314.

For the reasons discussed here and in my letter of March 2, 2001, this charge must be dismissed.

Right to Appeal

Pursuant to PERB Regulations[3], you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

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[2] The collective bargaining agreement, at Article 3.2, provides that the parties agree to meet and consult within five days to consider a claim that the section has been violated.

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
Bernard McMonigle
Regional Attorney

Attachment

cc: Brian P. Walter

Warning Letter

March 2, 2001

Michael Baranic
Law Offices of James Gattey
2445 Fifth Avenue, Suite 350
San Diego, California 92101

Re: American Federation of Teachers Guild, California Federation of Teachers, Local 1931 v. San Diego Community College District
Unfair Practice Charge No. LA-CE-4207-E
WARNING LETTER

Dear Mr.Baranic:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 18, 2000. The American Federation Of Teachers Guild, California Federation Of Teachers, Local 1931 alleges that the San Diego Community College District violated the Educational Employment Relations Act (EERA)[1] by prohibiting the distribution of certain materials through its internal mail system. On March 1, we discussed this charge.

Your charge states the following. Charging Party represents three bargaining units at the District. Two of these units, an office-technical unit and a food services unit, continue to operate under the terms of collective bargaining agreements negotiated by a former exclusive representative. Article 3.2 of the Office-Technical agreement states,

> Neither the District nor CSEA [AFT's predecessor] shall use District intrasite mail service or bulletin boards to transmit materials or post notices that defame the members of the Board of Trustees, its agents, bargaining unit members, or representatives or agents of CSEA. The parties agree to meet and consult within five (5) working days to consider any claim that this Section gas been violated.

On May 26, 2000 AFT local president Jim Mahler prepared a memorandum to John Schlegel, a District assistant chancellor titled "Apparent Embezzlement Coverup". The memorandum

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

criticized Schlegel for characterizing a "misappropriation of district travel funds" by Brian Olsen, president of the District's Board of Trustees, as an "overpayment error". Mahler suggested that it was more appropriate that the District seek prosecution of Olsen for felony embezzlement.

On May 26, Charging Party delivered copies of the memorandum to the District for distribution to bargaining unit members through its intrasite mail system. Only members of the Office-Technical unit, employed at the District offices, did not receive a copy.

On June 1, 2000 Mahler sent another memorandum to Schlegel, titled "Oppressive Interrogation Tactics/Gross violations of Food Service Workers' Due Process Rights". In it Mahler accused Schlegel of directing managers to "deliberately mislead nearly a dozen food service workers", allowing "interrogators to 'blackmail'" food service workers, and other acts which together violate state and federal statutes and "treatment that is usually found in countries where human rights abuses regularly occur".

The memorandum was distributed through the intrasite mail to all employees represented by Charging Party except those in the Office-Technical unit at the District offices.

Charging Party contends that it was wrongfully denied use of the District's mail system to distribute the above memorandums to Office-Technical unit employees. Charging Party notes that it has a statutory right to use of the mail system, subject only to reasonable regulation by an employer, under Government Code 3543.1(b). PERB has determined that regulation is reasonable only where speech is likely to cause "substantial disruption of or material interference with school activities". Richmond Unified School District (1979) PERB Decision No. 99.

The Board has also determined that proposals which define or expand a union's right of access are negotiable. In this case the parties are governed by a provision from the previous exclusive representative's contract with the District. That provision sets forth a joint determination of reasonable regulation of the intrasite mail system. Accordingly, the appropriate test for determination of a violation of EERA is whether the employer has committed a unilateral change by refusing to deliver the subject memorandums.

Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

In this case, you have not demonstrated that the District has implemented a change in policy. The agreement provides that no materials may be sent through the system which are defamatory of members or representatives of either party. The memorandums which the District refused delivery attacked the good name or reputation of District representatives.

Accordingly, the District was under no obligation to circulate them and this charge must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before March 9, 2001, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC